**International Union of Operating Engineers, Local 825, ABCDR & RH, a/w AFL–CIO *and* Bay Steel Deck Erectors, Inc. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 480.** Case 22–CD–584

April 9, 1992

## DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on May 16, 1991, by the Employer, Bay Steel Deck Erectors (Bay Steel) alleging that the Respondent, International Union of Operating Engineers, Local 825, ABCDR & RH (Operating Engineers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the International Association of Bridge, Structural and Ornamental Iron Workers, Local 480, AFL–CIO (Iron Workers). The hearing was held on September 11, 1991, before Hearing Officer Norma B. C. Sharp. Thereafter, the Employer and the Operating Engineers filed briefs in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

### I. JURISDICTION

The Company is a New Jersey corporation engaged in the installation of floor decking, with its principal place of business in Brick, New Jersey, where it annually receives goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Operating Engineers and Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE DISPUTE

#### A. *Background and Facts of Dispute*

Bay Steel separately subcontracted Rabinowitz Ironworks, Inc. and Damon G. Douglas Company to install sheet metal floor decking at jobsites in Springfield and Hackensack, New Jersey, respectively. Bay Steel's employees are represented by the Iron Workers. Sometime in May or June 1991 the business agent for the Operating Engineers contacted Charles O'Neil, the vice president of Bay Steel. The agent told O'Neil that Bay Steel did not have an agreement with the Operating Engineers for the work at the Springfield site and would have to have a man to ''cover,'' i.e., turn on and off and maintain, the welding machine, or the Operating Engineers would picket the jobsite. O'Neil refused to comply and picketing began 2 days later. The picket signs stated: ''Local 825 versus Bay Steel No Signed Agreement.'' Bay Steel employees crossed the picket line, but the crane operators, who were members of the Operating Engineers, honored the picket line and work ceased. The site owner, Rabinowitz Ironworks, told Bay Steel to leave until the crane work was completed. Bay Steel left and returned to complete its job after the crane work was done.

According to Bay Steel Vice President O'Neil, picketing began at the Hackensack construction site after O'Neil advised Operating Engineers' Business Agent Craig Wask that Bay Steel did not need someone to ''cover'' the welding machines. O'Neil testified that Bay Steel was forced off the job by Damon Douglas, Inc. in order to end the picketing. Bay Steel subsequently filed a petition for a representation election and unfair labor practice charges alleging violations of Sections 8(b)(7)(C), 8(b)(4)(ii)(B), and 8(b)(4)(i) and (ii)(D). The Regional Director obtained a voluntary cessation of picketing at the Springfield site and an agreement not to picket the Hackensack site so that Bay Steel could return to the sites and perform its work.

#### B. *Work in Dispute*

The disputed work involves the starting, stopping, and maintenance of welding machine engines. The welding machine engine is mounted on the back of a pickup truck, which is driven by a foreman who is represented by the Iron Workers. The welding machine is started by flipping a switch on the engine.

#### C. *Contentions of the Parties*

Bay Steel contends that reasonable cause exists to believe that the Operating Engineers violated Section 8(b)(4)(D). It argues that the task of ''covering'' the welding machine engine should be assigned to its employees who are represented by the Iron Workers with whom it has a collective-bargaining agreement. Bay Steel asserts that the collective-bargaining agreement, employer preference, practice, economy and efficiency favor assignment of the disputed work to employees represented by the Iron Workers. Additionally, the Employer seeks a broad determination contending that there is a likelihood that similar disputes will recur in the geographical area.

The Operating Engineers argues that it seeks to represent those employees assigned to ''cover'' the welding machine engines and does not claim that the dis-

puted work has to be assigned to employees it represents. It further maintains that its picketing was lawful within the limits of Section 8(b)(7)(C) of the Act because its purpose was to obtain an 8(f) prehire agreement. It also argues that the dispute is moot because the picketing has stopped and the work is completed.[1]

The Operating Engineers also argues that a broad determination is unnecessary because a similar dispute is not likely to occur because it has agreed not to picket or threaten to picket for an 8(f) agreement covering persons operating welding machines.

Iron Workers, Local 480, did not appear or take part in the proceeding.

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute.

Bay Steel Vice President O'Neil testified that agents of the Operating Engineers claimed the work in dispute and then picketed the Springfield and Hackensack worksites.

Operating Engineers argues that it did not violate Section 8(b)(4)(D) because its picketing was recognitional. Although its contention that it was seeking to represent the employee performing the disputed work and a contract with the Employer might support a finding that it had a recognitional objective, the issue in a 10(k) proceeding is whether reasonable cause exists to believe that the respondent had as one objective forcing or requiring the employer to assign the disputed work to individuals represented by it. *Electrical Workers IBEW Local 701 (University of Chicago)*, 255 NLRB 1157, 1161 (1981).

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and, in the absence of any claim or evidence to the contrary, that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k). Accordingly, we find that the dispute is properly before the Board for determination.

### E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

#### 1. Collective-bargaining agreements

Vice President O'Neil testified that Bay Steel has had collective-bargaining agreements since 1983 with the Iron Workers which represents the employees assigned the responsibilities of welding metal decking to flooring. He also testified that the agreement does not specifically mention the work in dispute. The mere existence of a collective-bargaining agreement is not a factor favoring a work assignment. Thus, this factor favors neither group of employees.

#### 2. Employer preference and past practice

The Employer prefers to award the work in dispute to employees represented by the Iron Workers. Bay Steel has had a collective-bargaining agreement with the Iron workers since 1983. It has never hired an engineer to start, stop, or service the welding machine engine. Generally, the foreman at the jobsite turns the welding machine engine switch on or off. Employees represented by the Iron Workers also start the machine when doing welding.

Thus, the factor of employer preference and past practice favors the assignment of the work in dispute to the Employer's employees represented by the Iron Workers.

#### 3. Area and industry practice

The work in dispute has been assigned to members of the Iron Workers as well as to members of the Operating Engineers in the area. Witnesses from PSM Steel Construction and McManus Steel Deck Erectors, Inc. testified as to area practice.

Richard Paluzzi, vice president of PSM Steel, testified that PSM had employed, for approximately 3 years, a member of the Operating Engineers whose sole purpose was to start, stop, and service welding machines. Paluzzi testified that PSM had signed a contract with the Operating Engineers in October 1984 when PSM was required, allegedly as a result of threats made to its steel deck supplier, to hire an engineer even though it did not need or want one. He also testified that employees represented by the Iron Workers would also start and stop the machines and that, since 1989, the task of ''covering'' and maintaining the machines has been assigned to employees represented by the Iron Workers.

Michael McManus, secretary of McManus Steel, testified that McManus Steel, which also uses welding machines in installing metal floors, uses employees represented by the Operating Engineers as well as employees represented by the Iron Workers. According to

[1] We find without merit the Operating Engineers' argument that the jurisdictional dispute is moot.

McManus, the assignment depends on whether the Operating Engineers insists that a member of the Operating Engineers ''covers'' the welding machine. We find that the factor of area practice is inconclusive.

4. Relative skills

All of the witnesses testified that no skill is required to perform the work in dispute of turning the engine on and off, and changing the oil and air filters. Thus, the factor of relative skills favors neither group of employees.

5. Economy and efficiency of operations

Currently the work in dispute is performed by employees represented by the Iron Workers, with whom the Employer has a collective-bargaining agreement. After starting the welding engine these employees perform other functions, including welding. In contrast, the Employer employs no employees represented by the Operating Engineers and if the Employer did employ an operating engineer merely to ''cover'' the welding machine engine that employee would be idle for most of the work day. For example, Vice President Paluzzi of PSM Steel testified that when that company employed an operating engineer to perform the work in dispute he had nothing to do during the work day because the iron workers, who arrived at the jobsite first, turned on the welding machine. The operating engineer would service the machine when it was not being used, a task that took approximately 2 hours, was necessary only every few months, and could have been performed by employees represented by the Iron Workers.

We find the factor of economy and efficiency of operations favors assignment of the work in dispute to employees represented by the Iron Workers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Iron Workers Local 480 are entitled to perform the work in the dispute. We reach this conclusion relying on the factors of employer preference and past practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Iron Workers Local 480, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[2]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Bay Steel Deck Erectors, Inc. represented by the Iron Workers Local 480 are entitled to perform the disputed work of starting, stopping, and maintaining welding machine engines at the Springfield and Hackensack, New Jersey jobsites of Bay Steel Deck Erectors, Inc.

2. International Union of Operating Engineers, Local 825 ABCDR & RH, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Bay Steel Deck Erectors, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Operating Engineers, Local 825, ABCDR & RH, a/w AFL–CIO, shall notify the Regional Director for Region 22 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

[2] The Employer's request for a broad determination is denied. A broad determination may be justified where there is evidence of similar and widespread practices with the same unlawful objective. See *Teamsters Local 5 (Mid South Fire Protection)*, 224 NLRB 1605 (1976). The subjective testimony of witnesses Paluzzi and McManus that their companies would not have entered into collective-bargaining agreements with Operating Engineers without some pressure is not sufficient to establish that a broad determination is warranted here.